

**IN THE DISTRICT COURT  
AT WHANGAREI**

**CRI-2015-088-002025  
[2016] NZDC 5505**

**THE QUEEN**

v

**ZELYN TAKAIRO HIKITANGATA  
JOHN BUSTER JUNIOR ROBSON AKA  
JOHN BUSTER JUNIOR WIRA**

Hearing: 4 April 2016

Appearances: M Jarman-Taylor for the Crown  
A Dooney for the Defendant Hikitungata  
Mr Skinner for J Moroney for the Defendant Robson

Judgment: 4 April 2016

---

**DECISION OF JUDGE D J McDONALD**

---

[1] Both Defendants are charged that on 23 July 2015 at Dargaville robbed Mr Hemi Nathan of clothing, a wallet and an IPod. Mr Hikitungata faces a charge of assaulting Mr Nathan with intent to injure him. Mr Robson had been charged with injuring with intent to injure arising out of the same incident to which he pleaded guilty before being committed to trial. He waits to be sentenced on that charge.

**Challenge to search warrant**

[2] Mr Dooney, on behalf of Mr Hikitungata advised the Crown that he was challenging the search of [address deleted], Dargaville on 24 July 2015. Mr Dooney, having reviewed Mr Hikitungata's position he now abandons that challenge.

## **Mode**

[3] The Crown have applied for orders under s 103 and s 105 Evidence Act 2006 that the complainant, Mr Hemi Nathan give evidence in an alternative way, that is by closed circuit television. That application is not opposed by either Defendant. I make the order as sought. Having considered the application on the grounds advanced therein by the Crown I considered that an order is appropriate.

## **Propensity**

[4] The Crown seek to call propensity evidence against Mr Robson only. It is opposed by Mr Moroney, on behalf of Mr Robson.

### *The current charge*

[5] On the afternoon of 23 July 2015, Mr Nathan who at the time was 18, was drinking and socialising with friends at a number of houses in Dargaville. During the evening he and his friends saw Mr Robson walking along the street. Mr Nathan and his friends stopped and after a short conversation Mr Robson got into their motor vehicle and drove to [address deleted]. There more socialising was done.

[6] At approximately 8 pm Mr Robson accused Mr Nathan of stealing a cigarette lighter that belonged to Mr Robson's sister. Mr Nathan remembered that he had the lighter and handed it over. He then went off to have a sleep in one of the rooms at the house. Mr Robson and the other Defendant, Mr Hikitungata, approached the room where Mr Nathan was and verbally abused him attempting to get him to have a fight with them. Mr Nathan refused to do so. He was slapped a number of times by Mr Hikitungata. Mr Nathan tried to leave the room but was blocked from doing so by the two Defendants. They then left the room.

[7] Mr Nathan walked out into the lounge and sat down on a couch. He was assaulted in the lounge, punching and slapping, by the two Defendants. Mr Nathan returned to the bedroom where he sat on the floor. Mr Robson followed and told Mr Nathan to extend his arms whereupon Mr Robson stubbed out a lit cigarette on

each of his arms on the inside of his elbows. Mr Hikitungata was there striking Mr Nathan with his knees, pushing and punching him to the face. The three went back into the lounge.

[8] Mr Nathan had left his mobile phone and wallet on the kitchen table. Mr Robson grabbed the iPhone off the table and said he was going to keep it. He then went to a kitchen drawer, removed a knife, approached Mr Nathan, pointed the knife at Mr Nathan at close distance. He was then told by both Defendants to remove his clothing as Mr Hikitungata wanted them. First he resisted but then did so, stripping down to his boxer shorts. Mr Hikitungata got a pair of tracksuit pants and a t-shirt for Mr Nathan and told him to put them on. Using the excuse he needed to use the toilet, Mr Nathan went to the toilet, climbed out a window and ran towards the Dargaville township where he waved down a security officer who alerted the police.

[9] Mr Hikitungata told the police he had taken Mr Nathan's clothes and hid them as a prank. Mr Robson told the police he was angry with the complainant for stealing his sister's lighter.

### **The early conviction**

#### *Mr Robson's robbery, Kaitaia District Court 7 December 2005*

[10] At 11.30 am on Wednesday 7 December 2005, Mr Robson, then known as Wira was driving along Commerce Street, Kaitaia. He had an associate with him. Mr Robson saw a male tourist hitchhiking. Mr de Vries, the hitchhiker, was holding a sign indicating he wished to travel to Rawene. Mr Robson pulled over. He offered a ride to Mr de Vries as far as the Wainui junction. He told Mr de Vries that he was heading out to Ahipara to go surfing. Mr de Vries got into the back seat of the car and put his backpack beside him.

[11] Mr Robson drove off. Instead of taking the route that had been discussed Mr Robson drove off the main road. When Mr de Vries asked Mr Robson where they were going he was told that they were going to a beach to pick up a surfboard.

Mr Robson stopped on the road which overlooked a house in a gully below. Mr Robson and his friend got out. Mr de Vries tried to get out as well but found his door was locked. He, however, was able to unlock his door and got out of the vehicle telling them that was as far as he was going with them. Without warning Mr Robson went over to Mr de Vries and punched him once in the forehead hitting him just above the right eye. Mr de Vries fearing for his safety immediately ran back down the road. He ran into a nearby house and obtained help.

[12] When spoken to by the police Mr Robson admitted that he picked up the hitchhiker intending to steal his cash because he was desperate for money. He said his friend took no part in the robbery. He said he had sold the entire contents of the backpack for \$100, apart from personal diaries and travel logs which he had taken home. Mr Robson pleaded guilty to robbery in the Kaitaia District Court on 30 April 2006.

### **Propensity**

[13] The Crown wishes to call the evidence of the previous conviction for robbery as propensity evidence. The Crown seek to do this by tendering a certificate of conviction and producing an agreed summary of facts.

[14] The Crown submit that the evidence tends to show the Defendants propensity to act in a particular way, that is to behave violently to overcome any resistance to the taking of property.

### **The evidence**

[15] The proposed propensity evidence must have probative value in relation to an issue in dispute in the proceedings and that the probative value outweighs the risk that the evidence may have an unfairly prejudicial effect on the Defendant. The evidence must be relevant under s 7.

[16] I have regard to the majority judgment of Tipping J and *Mahomed v R*<sup>1</sup>. As was said at paragraph 3:

The rationale for the admission of propensity evidence rests largely, as William Young J says, on the concepts of linkage and coincidence. The greater the linkage or coincidence provided by the propensity evidence, the greater the probative value that the evidence is likely to have. It is important to note, however, the definition of propensity evidence refers to a tendency to act in a *particular* way or to have a *particular* state of mind. It is necessary, therefore, that the propensity have some specificity about it.

[17] While the proposed propensity evidence might tend to show the Defendants propensity to act in a particular way, that is to use of violence to overcome resistance to property being taken, the issue in dispute here is whether, firstly, a knife was presented by him and secondly, whether the items were actually taken. There is no robbery if there is no theft. It is doubtful whether, having regard as one must to the issues in dispute, that this is propensity evidence as defined.

[18] If I am wrong in that I consider that the 2005 incident should not be called as propensity evidence. I struggle to find a similarity between the two sets of offending.

[19] In the first the victim was unknown to Mr Robson. In the second he was. In the first, that was a planned robbery from the moment he saw the hitchhiker. In the second current offending the alleged robbery was a follow on, indeed if it occurred at all, from an earlier dispute between the complainant and Mr Robson's about Mr Robson's sister's cigarette lighter. There is then violence which has nothing to do with the later taking of the items. There is no evidence, even by inference, that at the early stage Mr Robson was contemplating taking anything.

[20] In the earlier incidents Mr Robson used his motor vehicle to drive the hitchhiker to a reasonably remote location, where he punched him once causing the complainant to flee before taking off with his backpack. The second occurred at a house where Mr Robson and the complainant were socialising. After some earlier disagreements it was alleged that Mr Robson obtained a knife, pointed it at him and

---

<sup>1</sup> [2011] NZSC 52, at paragraphs 3,5 and 7

then took not only the items on the table but also demanded that the complainant remove his clothing which he did, which were then taken. I consider that there is not, apart from the fact that one is robbery and one is an aggravated robbery similarities between the two sets of offending.

[21] The earlier offending occurred nine and a half years ago before the second; 7 December 2005, 23 July 2015. There is only one earlier incident.

[22] Even if I was to accept that this evidence is propensity evidence I am satisfied that the prejudicial nature of this evidence far outweighs its probative value. There would be a very real danger of the jury reasoning, “Well you have done this once before then you must have done it this time as well.” Even a strong judicial warning would not overcome that sort of prejudice.

### **Result**

[23] The Crown application to call propensity evidence is refused.

D J McDonald  
District Court Judge